

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE DOUGLAS EDWARDS,

Defendant-Appellant.

UNPUBLISHED

April 12, 2007

No. 266207

Ingham Circuit Court

LC No. 05-000499-FH

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, and sentenced, as a second-habitual offender, MCL 769.10, to serve a term of 7 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

I. Ineffective Assistance of Counsel

Defendant first argues that his trial counsel was ineffective on a number of grounds. Because defendant failed to preserve these claims by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors that are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). To establish a claim of ineffective assistance of counsel, defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for defense counsel's errors, the result of his trial would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Whether the facts in the record suggest that defendant was deprived of his right to the effective assistance of counsel presents a question of constitutional law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

We agree that trial counsel's failure to object to the responding officer's testimony recounting the victim's statements on the night of the assault fell below an objective standard of reasonableness. As argued by defendant, the officer's recitation of the victim's statements was hearsay, and no exception was applicable. See MRE 801 and 802. Nevertheless, defendant has failed to show that, but for trial counsel's error, there is a reasonable probability that the trial result would have been different. *Toma*, *supra* at 303. The officer's testimony was nearly identical to the victim's testimony recounting the events on the night of the assault. Thus, the officer's testimony was merely cumulative. In addition, defendant's own testimony corroborated

the basic facts of that night: that the victim went to defendant's house where a fight ensued, during which defendant attacked the victim by punching, backhanding, and striking her with an open hand, then pinning her to the ground until she became unconscious. Even without the officer's testimony, the jury heard sufficient evidence to convict defendant. Therefore, defendant has failed to satisfy his burden of showing that the outcome of the trial was affected by counsel's failure to object to the officer's testimony. *Id.* at 302-303. Consequently, defendant is not entitled to relief.

Defendant is similarly entitled to no relief on his claim that his trial counsel was ineffective for failing to object to the prosecutor's questions regarding why defendant did not tell the police his side of the story. Except in certain circumstances not at issue here, a defendant's right to due process, as guaranteed by the Fourteenth Amendment, is violated where the prosecutor uses post-arrest, post-*Miranda*¹ warning silence for impeachment or as substantive evidence. *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573 n 5; 628 NW2d 502 (2001). Here, however, there is nothing in the record that indicates that defendant was ever apprised of his *Miranda* rights, even after his arrest. Moreover, although the prosecutor's questions covered both pre-arrest and post-arrest time periods, there is no indication that defendant ever invoked his constitutional right to silence. A defendant's right to due process is implicated only where his silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda* warnings. *People v Schollaert*, 194 Mich App 158, 163-164; 486 NW2d 312 (1992). Therefore, where a defendant has received no *Miranda* warnings, as in this case, "no constitutional difficulties arise from using the defendant's silence before or after his arrest . . . unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege." *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). Because there is no constitutional problem with the prosecutor's questioning, trial counsel was not ineffective for failing to object. Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Moreover, we note that even if we were to agree that the questions were objectionable, defendant cannot demonstrate that, but for the failure to object, the outcome of trial would have been different. Indeed, as previously explained, defendant acknowledged during his testimony at trial having assaulted the victim in a manner sufficient to support his conviction.

Defendant also argues that his counsel was ineffective because he allowed a member of a domestic violence advocacy group to provide irrelevant testimony. The domestic violence advocate testified about her organization and the fact that approximately forty percent of domestic violence cases involve strangulation. She also stated that memories of domestic violence can return slowly and that domestic violence is about power and control. "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. We find that the domestic violence advocate's testimony was relevant, even if only minimally, because it made it more likely that the victim was telling the truth about defendant choking her and because it helped explain any holes or inconsistencies in

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

the victim's account of the assault. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995) ("whether [a] witness is truthfully and accurately testifying is . . . relevant because it affects the probability of the existence of a consequential fact"). Because the advocate's testimony was arguably relevant, defendant was not deprived of the effective assistance of counsel. Again, trial counsel does not have to make meritless or futile objections. *Ackerman, supra*.

Defendant next argues that his trial counsel was ineffective because he did not insist that the police perform DNA testing to confirm whether the victim's blood was on defendant's jeans. Defendant alleges that trial counsel owed defendant a duty to make a reasonable investigation into the blood-like substance on his pants. However, insisting that the police perform DNA testing in this case would have been unreasonable. The investigating officer testified that she did not submit the jeans for DNA testing because it is expensive, time consuming and unnecessary for the investigation of this case given that the victim was the only person to have suffered injury that night. Moreover, defendant admitted that he assaulted the victim. Thus, it was largely immaterial whether the substance on defendant's jeans was the victim's blood, and defense counsel may have decided for strategic reasons not to obtain DNA testing, which may have confirmed the presence of the victim's blood. Because a motion to compel DNA testing was not reasonably necessary, trial counsel's performance did not fall below an objective standard of reasonableness. Defendant is not, therefore, entitled to relief. *Toma, supra*.

Defendant additionally argues that his trial counsel was ineffective because he did not request a self-defense jury instruction. A defendant is entitled to have his counsel present all substantial defenses, namely defenses that would have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). And, a defendant has a right to a properly instructed jury, but the evidence must support a particular instruction. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000); see also *People v Truong*, 218 Mich App 325, 341; 553 NW2d 692 (1996). In this case, the evidence did not support a self-defense instruction.

A successful claim of self-defense requires that the defendant had an honest and reasonable belief that he was in danger, and used only that amount of force necessary to defend himself. See *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); see also *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). A defendant may not generally claim self-defense where he used excessive force or was the initial aggressor. *Kemp, supra* at 323. Defendant testified that it was the victim who initiated their physical altercation by hitting him in the neck and charging at him. Defendant admitted that, in response, he backhanded her and then pinned to the floor, where he sat on her, punched her in the face, and slapped her. Defendant admitted that he caused the victim's injuries and, according to the police officer who arrested defendant, he did not have any visible injuries. Even accepting defendant's testimony that the victim was the initial aggressor as true, defendant cannot assert self-defense because he used excessive force to repel the attack he claims was mounted by the victim. Indeed, defendant did not try to merely subdue the victim, but rather backhanded her, punched her in the face, and sat on her until she was unconscious. This far exceeds the force necessary to defend himself. *Id.* at 322. Because the evidence did not support a self-defense instruction, trial counsel was not ineffective for failing to request such an instruction. *Truong, supra*.

Finally, defendant argues that the cumulative effect of counsel's errors entitles him to reversal. We disagree. Although "[t]he cumulative effect of several minor errors may warrant

reversal even where individual errors in the case would not,” reversal is warranted on such ground “only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial.” *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). As explained above, only one of the challenged actions fell below an objective standard of reasonableness, and that action did not prejudice defendant. Therefore, the cumulative error argument is without merit.

II. Denial of Motion to Adjourn

Defendant next argues that he was deprived of his right to present a defense because the trial court denied his request for an adjournment to produce three defense witnesses. We review a trial court’s denial of a defendant’s request for an adjournment for an abuse of discretion. *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987).

In order to invoke the trial court’s discretion to grant a continuance or adjournment, a defendant must show both good cause and due diligence. *Id.* Even with good cause and due diligence, however, a trial court’s denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). A trial court may grant an adjournment “on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.” MCR 2.503(C)(2). Here, defendant sought an adjournment in order to produce witnesses he had subpoenaed but who were not present in court. Although defendant made diligent efforts to make the witnesses available by serving them with subpoenas and calling them to confirm their attendance, defendant cannot satisfy the first prong of the court rule. The trial court denied defendant’s request for an adjournment because the evidence defendant wished to present through the three witnesses was cumulative and/or irrelevant. As noted, in order to receive an adjournment, a defendant must show that the evidence he will present through the missing witnesses is material. MCR 2.503(C)(2). In this case, defendant failed to meet his burden. Other witnesses had already presented the testimony defendant wished to present, and none of the witnesses’ testimony would have revealed new or otherwise relevant facts about the assault, the victim’s relationship with defendant, or the victim’s credibility. Therefore, the trial court did not abuse its discretion when it denied defendant an adjournment.

III. Prosecutorial Misconduct

Defendant next argues that he was deprived of a fair trial due to prosecutorial misconduct. Specifically, defendant claims that the prosecutor improperly shifted the burden of proof to him when, in his closing argument, he stated that defendant “has every reason not to tell you the truth because he’s on trial.” Defendant failed to object to the contested remark at trial. Accordingly, he has failed to preserve this issue for our review. We review unpreserved allegations of prosecutorial misconduct for plain error affecting defendant’s substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). “The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted).” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). “Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context.” *Id.* at 272-273.

Viewed in context, the challenged statement did not shift the burden of proof to defendant. A prosecutor may argue from the facts that the defendant is not is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor is even permitted to characterize the defendant as a “liar,” if the comment is based on the evidence produced at trial. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Moreover, arguments that point out the weakness in a defendant’s case do not necessarily shift the burden of proof. See *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). Unless the prosecutor’s comments burden the defendant’s right not to testify or unless they allocate any burden to defendant to disprove an element of the offense, they are not improper. *Id.* at 112-113. Here, the prosecutor made the challenged statement but then listed all of the inconsistencies in defendant’s testimony. Clearly, the remark was designed to question defendant’s credibility and point out to the jury that defendant has a very good reason to lie. The remark in no way shifted the burden of proof to defendant and was not improper.

IV. Sentencing

Relying on the rule of law set forth in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant next argues that he is entitled to resentencing because the trial court, when scoring certain offense variables, violated his due process rights by considering facts that were neither proved beyond a reasonable doubt at trial nor admitted by defendant. Our Supreme Court has, however, expressly held that the principles announced in *Blakely* do not apply to Michigan’s indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006). Therefore, defendant is not entitled to resentencing on this ground.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski